How to Prepare a Will

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HOW TO PREPARE A WILL

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Mr. Tucker was born at New Bedford, Massachusetts, on January 19, 1852. He received the degree of Bachelor of Arts from Brown University at Providence, Rhode Island, in 1873, and his degree of Bachelor of Laws at Boston University in 1875. Subsequently, the degree of Doctor of Philosophy was conferred upon him. He practiced law in New Bedford from 1876 to 1882 and then removed his law office to Boston, where he is in practice today.

From 1890 to 1892, Mr. Tucker was a member of the Legislature of the Commonwealth of Massachusetts. In 1892, he was appointed the Official Reporter of the Decisions of the Supreme Court of Massachusetts. He served in this position until the year 1900.

Mr. Tucker is the author of numerous treatises and articles relating to the law. Among the important are "Naturalization," in MODERN AMERICAN LAW, "Testamentary Forms and Notes on Wills," and "Manual of Massachusetts Corporations." He is joint author of Gould and Tucker's "Notes on United States Statutes," and with Dr. Wilson of Harvard on "International Law."

HOW TO PREPARE A WILL

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WHY ONE SHOULD MAKE A WILL AND WHERE THE WILL MAY BE MADE

Why One Should Make a Will.—It is a frequent observation, "I am not going to make a will, because I am entirely satisfied with the disposition which the law will make of my property after my decease." This is a thoughtless remark, for generally there are the best reasons for making a will, even if the testator gives his property exactly as it would descend if he left no will. For example, a man may name his executor in his will and release him from giving a surety or sureties upon his official bond. He may also empower him to sell property without an order of court. Thus the settlement of the estate is made more easy and expense is avoided.

A person may have large obligations and a good deal of property not readily marketable. He may make a will for the purpose of instructing his executor how to marshall assets to pay the debts. This applies to business men who are hiring a good deal of money. The instructions would vary according to the circumstances of each case.

A testator may desire to give his executor instructions as to carrying on his business for a period long enough to liquidate obligations and husband resources.

The question of the executor's compensation may be important. If the testator's affairs are so involved as to require skill, time and experience on the part of the executor, he may provide in the will for liberal compensation, or, if the estate is safely invested and there are few obligations, smaller compensation.

It is perhaps the duty of the administrator, if there is no will, to insure the estate. In the will the testator may give special instructions as to insurance.

The testator may desire to make certain provisions as to money advanced by him to his children as evidenced by promissory notes, book charges, etc. So also as to equalizing gifts of property made to his children. This is important when there is a large family. A carefully drawn provision may be inserted in the will stating that the amount advanced to a child shall be deducted from the share given him.

From the above it is obvious that there may be excellent reasons for making a will even though the testator gives his property as it would descend if he left no will.

Where the Will May Be Made.—With some exceptions, a will may be made in any part of the globe, but, if made at a place distant from the testator's legal residence, he should have witnesses, if possible, of that residence. Suppose the will is made in Italy and the witnesses are all Italians. Bringing them to this country to prove the will would involve great expense.

If a testator changes his domicile he should learn from a lawyer whether a new will is necessary.

A famous man declared his domicile as follows:

"I, the Right Honorable Cecil John Rhodes of Cape Town in the Colony of the Cape of Good Hope hereby revoke all testamentary dispositions heretofore made by me and declare this to be my last will which I make this first day of July, 1899.

"I am a natural born British subject and I now declare that I have adopted and acquired and hereby adopt and acquire and intend to retain Rhodesia as my domicile."

A person about to make a will should understand that it pertains to property within the territory of his own jurisdiction, and whatever effect is given to it in other jurisdictions is a matter of comity or favor.

It is well to bear in mind that the descent, alienation and transfer of real estate are controlled by the law of the jurisdiction where it is situated.

Where a person has property, especially real estate, in a state or country other than his own, the following suggestions are pertinent: His attorney should ascertain whether the laws of the foreign state or country provide for the allowance of a foreign will. It may be said that they generally do. Proof of such foreign wills is very common in this country. For example, the will of a citizen of New Jersey, who owns real estate in Illinois, is duly proved in New Jersey. Then a certified copy of the will is proved in Illinois; otherwise it would not be possible to transfer the real property in that state.

Here it should be noted that, where real estate so situated in a jurisdiction other than that of the testator is given specifically, the attorney should ascertain the law of that jurisdiction relative to such a devise.

For example, a Massachusetts testator once devised valuable real estate in New York City in trust. After the will had been proved in New York, the devise was declared void as it violated New York law. The Massachusetts lawyer who drew the will should have submitted it before execution to a New York lawyer so that it might be drawn conformably to the laws of both states.

CAPACITY TO MAKE A WILL AND DANGER OF BREAKING IT

Every person twenty-one and of sound mind, and in some places a woman of eighteen, may make a will. The attorney, however, should be vigilant as to matters of fraud, undue influence, mistake and soundness of mind. There is a general impression that a person of advanced age cannot make a will. The impression is wrong. The question is one of the testator's mental capacity. In an effort to break a woman's will a judge charged a jury as follows:

"Soundness of mind, such as will enable a person, under the statute, to make a will, has relation to the business to be transacted, namely, the disposition of her property by will. Her mind must have been sound with reference to whatever is involved in this transaction; that is to say, she must have been able to understand, and carry in her mind, in a general way, the nature and situation of her property, and her relations to those persons who are about her; to those who would naturally have some claim to her remembrance; to those persons in whom, and those things in which, she has been mostly interested. She must have been capable of understanding these things, and the nature of the act she was doing, and the relation in which she stood to the objects of her bounty, and to those who ought to be in her mind on such an occasion, and free from any delusion

which was the effect of disease, and which would or might lead her to dispose of her property otherwise than she would have done if she had known and understood correctly what she was doing. All the testimony, covering the whole later portion of her life,—as to her relations and degree of intimacy with her brothers and sisters and nephews and nieces; as to what she said and what she did; as to her peculiarities, if you find that she had any; as to her disposition and temperament, her griefs and bereavements, her attacks of sickness, whatever you may find them to have been, her habits and manners; as to what you may find that she was not able to do, and what she was able to do,—may be considered so far as they will aid you in determining her condition of mind on (date of the will). Age is not of itself a disqualification, but it excites vigilance to see if it is accompanied with incapacity. Disease is not itself a disqualification, but all infirmities awaken caution to see if mental capacity is impaired or gone."

It is the common belief that wills are easily broken. This is an error. Attempts are frequently made, but are not often successful. The reasons for breaking a will generally assigned are unsoundness of mind, referred to in the judge's charge given above, and undue influence. The test in the case of undue influence is whether or not the testator was an absolutely free agent. The influence may be exerted by one who benefits by the will or by a third person. The important facts are the condition of the testator's mind as to soundness and its susceptibility to improper counsel and persuasion; what is done and said in preparing the will as bearing on motive, disposition, secrecy, etc., and the method employed by the influencing party; the will itself, that is, its character and provisions, whether unreasonable and unjust, always bearing in mind the relations existing between the testator and his relatives and benefici-

aries; statements made by the testator showing that he was unduly influenced and statements made by the interested party showing the part he took in the transaction, and lastly the existence of confidential relations between the testator and the person alleged to have exerted the undue influence.

Physicians should be very careful as to giving advice to patients in the preparation of their wills, and, indeed, should give no advice at all. There is no objection to a person's saying to one about to make his will, "I wish you would give me a legacy in your will." Beyond this it is not safe to go.

There is a method resorted to to ascertain what a will means, which is often incorrectly regarded as an attempt to break a will. This is what is called construing a will, not breaking it. For example, a question arises as to the meaning of the will; that is, the language is not clear. In the case of a trust, for example, births, deaths or the happening of events since the testator's death may have interfered with his intention so that the trustee is doubtful how to proceed. In such case the trustee files a petition requesting the court to instruct him, and the court's instructions become in reality a part of the will.

HOW WILLS DIFFER FROM OTHER DOCUMENTS

A testator may like to know how a will differs from obligations, such as contracts.

There is no contractual relation in the case of a will. It merely provides for gifts, and the legatees generally are not aware of the testator's bounty until the will is opened after his death.

Contracts generally take effect immediately; but a will does not take effect until the testator's death. It is evident that a man's property may greatly fluctuate in value between the time of making his will and his decease.

Many contracts, especially deeds, mortgages, etc., are recorded and hence are open to inspection; but the will is generally kept secret during the testator's life. A disclosure of its contents is gratuitous on his part.

The obligations of a contract must be observed by the parties thereto, but the testator may revoke his will at any time by destroying it.

Contracts deal with specific things and pertain in most cases to only a part of a man's estate. Nineteen wills out of twenty dispose of a man's entire estate.

The language used in framing contracts is nearly always exact and definite. A will may be drawn in the loosest way and obscure language may be used. Poorly constructed wills have caused boundless disappointment and discontent and have entailed great expense.

In the case of the parties to most contracts there is no kinship; in the case of a will the domestic relations are generally involved, especially when the legatees are of the testator's own blood.

Unfortunately a will often contains irrelevant and extraneous matter such as reference to the testator's infirmities and eccentricities and allusions in a spiteful way to certain individuals and even friends. This is unwise and sure to lessen respect for the testator's memory.

A contract is generally carried out by the parties to it; a will requires a general agent called an executor. It is to be noted that a written power of attorney which one gives while living is an authorization to the attorney to do some particular thing, but the power conferred upon an executor is to dispose of the entire estate given by the will.

After a contract has been fully carried out it is of no value, but after a will has been proved it is of great value, because it becomes a matter of record, and often title to real estate depends upon it.

Rules of construction in the case of contracts and wills differ, being more liberal in the case of wills. It is said as to wills, "Where two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention." It is said as to contracts, "Where there are two clauses in a contract, so totally repugnant to each other that they cannot stand together, the former shall be received and the latter rejected."

DIFFERENT KINDS OF WILLS

The advisable will is the one in the ordinary form, but a few exceptional wills may be mentioned.

A nuncupative will is one made by a soldier in service or by a sailor at sea. The will is declared orally by the testator, while in anticipation of death, before witnesses and is afterwards reduced to writing. Such wills are rare. The author has yet to learn of one so declared during the great war.

A contingent will is made to take effect on a con-

tingency, and, if the contingency does not happen, the will is not admitted to probate. Such a will is, of course, not advisable.

Sometimes a party for a certain consideration agrees to make a will in favor of another party. Some difficulty may be encountered in prevailing upon a court to uphold such an agreement. Such wills are also not to be encouraged.

There have been a few cases of mutual wills, and, while the law upon the subject is meagre, it is said, "The doctrine of the principal text-writers seems to be that, when a fair and definite agreement has been entered into between two persons to make mutual wills, and such wills have been duly executed, neither can revoke his will without giving notice to the other of such revocation. The most famous instance of a mutual will arose in Massachusetts many years ago and was known as the Howland Will Case. It was claimed by the niece that she and her aunt signed a mutual will, and, on the death of the aunt, this will was contested. A large estate was involved but no new law points were decided, as the case was eventually dropped. If A and B desire to make mutual wills the best way to proceed is as follows: Let A make a will giving all his property to B and let B make a will giving all his property to A. If, for example, A dies first, B will take A's estate under his will. Then B should destroy his own will as it gives his property to a deceased person and is no longer of any effect or value.

In some states holographic wills are permitted. A holographic will is one entirely written, dated and signed by the hand of the deceased.

The most important of all testaments next to the will itself is the codicil. It is sometimes called a little will. A testator may make any number of codicils. It is authentic that a testator in England once made thirty-three. Codicils are often dangerous because they are likely to conflict with the will and lead to confusion. It is often said that it is better to rewrite the entire will and not resort to a codicil. This is generally true, but an exceptional case is where there is apprehension that the testator's faculties have become impaired since making the will and there is a question whether he now has full testamentary capacity. If a codicil is executed and later declared void on account of unsoundness of mind, the will, made when the testator was in vigorous condition, will stand.

A codicil should state that it confirms "the will in all its provisions save as changed by this codicil." Even then care should be exercised to avoid ambiguities. For example, if a legacy of five thousand dollars is given to A in the will and another legacy of three thousand dollars is given to him in the codicil and no words are used to show the testator's intention, A will take eight thousand dollars in all. In such a case the will should clearly state whether the second legacy is to be added to the first, or whether it is to be substituted for the first so that the legatee will take only three thousand dollars.

Where powers of sale are given to executors or trustees in the will and one dies and a successor is named in the codicil without conferring upon him the powers of sale given the two named in the will, it is clear that both executors or trustees cannot act

under the powers given in the will. In a few well chosen words the executor or trustee named in the codicil may be invested with the same powers conferred on the executor or trustee named in the will.

As the will and codicil are in a certain sense one, the codicil should be securely annexed to the will. Suppose it is not so annexed and the will cannot be found and there is no certified copy thereof, the proof of the codicil will leave matters in a very unsatisfactory condition.

WHO MAY BE A DEVISEE OR LEGATEE

The word "devise" usually applies to real and "legacy" or "bequest" to personal estate, but the words are used interchangeably.

It is a general rule that nearly any one may take under a will. If a person is an infant or insane or otherwise incompetent a guardian will, of course, be appointed.

Nearly everywhere now a married woman is put upon the same footing as if she were single. Nevertheless forms like the following are still common both in the case of married and unmarried women:

I give to my daughter A five thousand dollars to be paid to her upon her separate receipt.

The legacies given in this will to my daughters, whether married or unmarried, shall be for their separate use, independently of any other person or persons.

Aliens may take personal property by bequest and in many states real property by devise. Indeed many treaties of this country with foreign countries

provide that the citizens and subject of either may dispose of both personal and real estate within the jurisdiction of the other. The following from the treaty with France is a good illustration:

"In all the States of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the Government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance, as are enjoyed there by its own citizens."

In nearly all jurisdictions corporations may take under wills; in a few they are disqualified unless specially authorized to take. The amount of property they may hold is in some states fixed by statute.

Municipal corporations are generally authorized to take legacies and devises, and the same is said of the United States.

WHAT MAY OR MAY NOT BE BEQUEATHED OR DEVISED

In a general sense a testator may dispose of all his property. The following considerations are worthy of notice.

After-Acquired Property.—Everywhere now a residuary clause in a will conveys not only the real and personal property the testator owned when the will was made, but any afterwards acquired by him.

Contingent Interests.—These may be bequeathed. For example, property is given to A for life and at his death to B absolutely. B may bequeath his interest, although A is living at the time of B's death, but the person to whom B bequeaths the property cannot have it in possession until A dies.

Property Which the Testator Does Not Own.—If the testator has property belonging to others and it is not distinguishable from his own, the owner may have to come in as a general creditor. It may be advisable to insert in the will a disclaimer of title as in the following form:

"I have in my possession the following securities belonging to my wife (full description). It is probable that with my wife's consent I may dispose of some of the above securities and reinvest the proceeds. I therefore direct my executor to transfer to my said wife as her separate estate all the above named securities or those subsequently purchased."

Deposits in Savings Banks.—A loose practice pre-

vails in some places of permitting a person to deposit money in a savings bank in his own name, as trustee for another, in order to evade the law limiting the amount of deposit from any one person. There has been much litigation on this subject. The attorney should ascertain from the testator whether he has entered into any such trusts.

Good-will of a Business.—This may be bequeathed.

Power of Appointment.—If a will which creates a trust for A provides that the principal, after the death of A, shall go to B or to any person whom B may name and appoint by an instrument in writing, this power so to appoint may be executed in B's will.

Policies of Life Insurance.—If policies on the life of the testator are made payable to him, he may, of course, bequeath the proceeds.

Heirlooms.—If a testator desires that some article of personal or domestic value shall remain in the family for a considerable period, the best method is to attach to the bequest an instruction or request as in the following form:

"I give my son A my gold watch, which was bequeathed to me by my father. I desire my said son to dispose of the same in such manner, if possible, that it may be held in the family during the succeeding generation, but I impose no restrictions."

Survival of Actions.—Much litigation has been occasioned by contracts failing to make clear whether a right of action does or does not survive. An attorney should ask a business man as to his outstanding obligations, for, if it appears that a right of action does or does not survive, he may desire to modify his existing contracts.

Testator's Body, Monuments and Burial Lot.—A testator may give instructions in his will as to cremation, but, if he desires to give directions as to the disposition of his body by burial, he should put them in a paper to be opened immediately after death and not in the will, as the will is generally read after the burial.

While in most states statutes provide that a reasonable amount expended for a monument may be allowed, testators often prefer to cover the matter in their wills. The testator should state in his will the date of his birth; otherwise the executor may be put to trouble in ascertaining the date.

Form.—I direct my executor to erect over my remains in my lot No. 19 in the Rural Cemetery in, etc., a suitable stone inscribed with my name and the dates of my birth and death. I was born on the ninth day of August, 1847. I authorize him to expend for the above purpose a sum not exceeding three hundred dollars.

Where statutes so authorize money may be deposited with municipal authorities for the perpetual care of a burial lot.

Form.—I direct my executor to place a suitable tombstone at my grave in the A Cemetery of, etc., not to exceed two hundred dollars in value, and to pay the proper board of municipal authorities an equal sum, the net income of which shall be expended for the perpetual care and preservation of my burial lot in said cemetery.

Residence of the Testator as a Home for the Family.—Often testators provide that the home shall be maintained for the benefit of the entire family. Gen-

erally such provisions for an open home should be merely the expression of wishes or requests.

Form.—It is my special wish that my said wife shall keep open the homestead devised to her above for the enjoyment and accommodation of all of our children and grandchildren, who may desire from time to time to visit her.

Personal Estate Subject to Incumbrance.—In the absence of any expressed intention in the will to the contrary, personal property specifically bequeathed is to be exonerated from all incumbrances placed upon it by the testator. For example, stock pledged for a debt. The attorney should bring this matter to the notice of the testator.

Carrying on Testator's Business.—If it is deemed best to give executors power to carry on the testator's business, the authority should be limited to as brief a period as is consistent with settling the estate.

Form.—I authorize and empower my executors to continue the business in which I am engaged at the time of my decease for a period long enough to liquidate the same; and to this end I confer upon them all power in the premises, including that of giving and renewing promissory notes.

Pews.—Where pews are made personal property by statute they may be bequeathed.

Dumb Animals.—Humane testators often make provision as to the care, custody, etc., of dumb animals.

Form.—I give to the Society for the Prevention of Cruelty to Animals of, etc., all the living dumb animals I may possess at the date of my decease to be

disposed of in the most humane manner by sale or gift or by depriving them of life.

Various Bequests and Provisions.—Sometimes a testator inserts in his will a provision to the effect that a certain conveyance of real estate made by him during his life is confirmed, as, "I hereby ratify and confirm a certain conveyance to A B made by me by deed dated, etc., and recorded, etc."

Sometimes it is provided that if one provision in the will is declared void, other provisions shall not be affected thereby, although perhaps such precaution is unnecessary.

Form.—If any provision in this will for any legatee shall prove to be invalid, I expressly declare that such invalidity shall in no wise affect or impair any other provision or provisions of this will or of any codicil hereto.

It is advisable that all bequests should be definite and certain. Sometimes a testator gives a person a legacy, which, added to the property that person already possesses, will make a certain amount. Such a provision is too indefinite, yet it sometimes appears as in the following form:

"I give A a sum of money, which, when added to the property she already possesses, will amount to five thousand dollars."

Often a will contains a direction as to purchasing some token of remembrance for a friend of the testator.

Form.—I give my friend A one hundred dollars as a token of kindly remembrance, and I trust that she will purchase with the same some memorial which will serve as a reminder of my esteem.

Often an ante-nuptial agreement; that is, a written agreement entered into by a man and woman before marriage, provides for the giving up by the wife of all interest in both the real and personal estate of the husband in consideration of a certain sum to be paid to her after his death. In the husband's will should appear a provision like the following:

"I direct my executors to pay to my wife A the sum of twenty thousand dollars in performance of the ante-nuptial contract made between us on the 10th day of, etc., in lieu of dower and all other rights whatever she may have in and to my real and personal estate."

If a will duly executed incorporates in itself, by reference, any outside document or paper, such outside document or paper so referred to, if in existence at the time of the execution of the will and clearly identified as the document or paper referred to therein, takes effect as part of the will.

This is a dangerous provision.

FORM OF THE WILL

All that is necessary in a will is that it discloses the intention of the testator as to this disposition of his property. The will may be irregular in form and the language obscure and inartificial, and the instrument may be written on waste paper and with a pencil, but if properly executed and witnessed it may be proved as will. It is for this reason that great care should be taken in the preparation of the document and an attorney should be employed to draft it. The probate of a will merely establishes its execution. The meaning of the will is another question.

If the will is in hand writing care should be given to chirography, for if it is necessary to decipher it there may be a difference of opinion as to the meaning of words and phrases. Most wills are now typewritten, but the very convenience of this method opens the way to fraud and forgery. To take away the inducement of any interested person, who may get hold of the will, to subtract a page or two and insert a substitute or substitutes the testator should sign every page of his will.

Care, too, should be taken in the matter of punctuation: In recent years in Massachusetts the punctuation of a sentence of a statute upset for a while the business of a great industry. A New York judge has said, "Punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity; but not in cases where no real ambiguity exists, except what punctuation itself creates."

There is no regular form for the commencement of a will. It should, however, be brief.

The following are common forms:

Know all men by These Presents, That I, A. B., of, etc., being of sound and disposing mind and memory, do make this my last will and testament, revoking all wills and codicils by me at any time heretofore made.

Know All Men by These Presents, that I, A. B., of, etc., do make this my last will and testament.

This is the last will and testament of me, A. B., of, etc.

I, A. B., of, etc., do make, publish and declare the following as and for my last will and testament.

Be it remembered that I, A. B., of, etc., do make

this my last will and testament, intending hereby to dispose of all the property over which I shall at my decease have a right of disposition, by appointment, will, or otherwise.

I, A. B., of etc., hereby revoke all testamentary dispositions heretofore made by me and declare this to be my last will which I make this tenth day of, etc.

In the name of God, Amen: I, A. B., of, etc., being of sound and disposing mind and memory, and mindful of the uncertainty of life, do make, publish and declare this to be my last will and testament, in manner following, that is to say:

THE RIGHTS OF HUSBAND, WIFE AND CHILDREN

While a single man or woman is unfettered in disposing of his or her property, a married man is in nearly every jurisdiction subject to restraints as to children and the issue of a deceased child, and as to his wife.

In most states if the testator does not provide for his children, or for the issue of a deceased child, in his will they will share in his estate as they would have shared if he had left no will, unless provision was made for them by him during his lifetime, or unless his failure to provide for them in the will was intentional and not occasioned by accident or mistake. The will should clearly express his intention. In England the disinheritance of a child or the issue of a deceased child is indicated by giving a shilling. In this country the method is to give a nominal sum or to use language showing that the testator has not forgotten his children or the issue of deceased children.

Forms like the following are frequently used:

I give to my only child A and to my only grandchild B, who is the son of my deceased daughter C, the sum of one dollar each.

I give to my only living children, A, B and C, the sum of five dollars each, and make no further provision for them as I am sure that their mother will provide for their education and support.

I purposely give no legacies in this will to my only children, A, B, C and D, and mention them herein to show that I have not forgotten them.

I intentionally exclude from any interest in my estate my daughters A and B and my son C and also any other child or children that may be born to me before or after my decease.

A testator often inserts a statement assigning reasons for a distinction in the treatment of children or grandchildren.

Having given my son A property equal to the amount he would take, if I left no will, I make no provision for him herein.

The gift to my daughter A of double the amount given to my son B is due to the fact that I have expended a great deal of money in my son's behalf, but have done nothing for my daughter beyond providing for her education and support.

Now as to wife.

Failure properly to provide for the wife has occasioned boundless trouble and expense. In several states, like Arizona, California, Louisiana, New Mexico, Texas and Washington the law provides for community property; that is, property owned by the

husband and wife. The following provisions are taken from California wills:

"All the property, real, personal and mixed, of which I may die possessed, is the common property of my wife and myself, the same having been acquired since our marriage, and upon my death, she surviving, she is entitled, in addition to the devises herein contained, to the undivided one-half of all thereof."

"I hereby declare that all of my property and estate has been acquired since my marriage with my beloved wife, A B, and is community property of myself and my said wife."

Nearly everywhere it is dangerous to give either husband or wife less than he or she would be entitled to, if there were no will. If husband or wife is given the right of waiving the other's will, such waiver may work confusion among the other provisions of the will. The rights of a wife in the property of her husband are variously termed dower, distributive interest, thirds, allowances, rights of succession, and widow's award. The rights of a husband in the property of the wife are called curtesy, distributive interest, etc.

Much litigation has been caused by a husband not making sufficient provision for the wife. When ample provision is made for the wife forms like the following may be used.

The provision in this will for my wife is in lieu of her statutory or other claims to my estate.

The bequests and devises herein to my wife are in lieu of dower, widow's award and all other provisions for her under the laws of this or any other

state where any of my property real or personal may be situated.

The provision for my wife in this will is in lieu of dower and widow's rights.

The provisions for my wife in this will are in lieu of her dower and in bar of her distributive share of my estate, her year's allowance and all other rights given her by statute or otherwise in my real and personal estate.

As to a married woman disposing of her property by will. The disabilities imposed by the law of coverture upon married women have been largely removed, and in many states the married woman is as free as her husband to dispose of her property by will. It is well, however, carefully to examine the statutes and decisions of the jurisdiction, as the old rule that she may dispose of property settled upon her sole and separate use, but not her general estate, may in a few cases obtain. There are also statutes in many places which forbid the cutting off of the husband without his consent. Attention is called to the remarks just preceding as to the rights of a married man to make a will, as most of the obligations are likewise imposed upon a married woman.

DESCRIPTION OF REAL ESTATE—CONDITIONS

If the will contains a residuary clause all the real and personal estate not previously given away in the will passes under it. When the devises and bequests, however, are specific the description should be clear and accurate. Thus in devising real estate it is advisable to show to the attorney deeds and mortgages, if any. Sometimes land is given, charged with the

Devises are frequently made to two or more as joint payment of money, to a third person. This is not advisable, as the charge on the land may cloud the title. tenants or tenants in common. Such devises are not to be encouraged as the holding of land by two or more jointly often causes trouble. Besides it may be difficult for one of the owners who desires to sell to find a purchaser, as people do not care to purchase land which they are to hold with others.

Real estate is frequently given to A for life and at his death to B to be his absolutely. Such a devise may be enlarged by making the remainder contingent, as, "I give my house and lot of land, located, etc., to A, for his life, and at his decease to the children of A, then living, to be theirs absolutely." It is plain that those who are to take the remainder cannot be determined until A dies.

There is what is called an executory devise; that is, where an estate is given to A, but upon some future event the estate is determined and then goes to B. Where real estate is given other than directly to the devisee the way is often open to litigation.

Real estate is often devised upon condition. Frequently such a devise clouds the title. Conditions are more common in the case of bequests of personalty. The following forms relate to both real and personal property:

Payment of Legacies.—If the time of payment of a legacy is postponed it should appear whether the legacy is to vest upon the testator's decease or whether time is to be annexed to the gift. If the legacy is to be paid to the legatee when, for example, he is twenty-five and he dies before reaching that

age and the language is such that the legacy vests in the legatee, the fund goes to his estate; otherwise to the testator's estate.

Forms.—I give to my son A the sum of ten thousand dollars, to be paid to him when he is twenty-five years of age, the legacy to vest in A at the time of my decease.

I give to A a legacy of five thousand dollars to be paid to him at the age of twenty-one. If he dies before that time the legacy shall fall into my residuary estate.

If the period of payment of a legacy is thus deferred a provision may be inserted as to the investment of the sum and the addition of income to the principal.

Often a condition as to approval is imposed as follows:

I give A a legacy of one thousand dollars to be paid to him with interest when he is twenty-one, provided he is worthy in the judgment of my executor to receive the same. Otherwise I give the legacy with interest to B.

Legacy to Executor or Trustee.—It is held that if a legacy is given to an executor or trustee he may not be entitled to it unless he qualifies. The intention should be expressed.

I give my executor A a legacy of five thousand dollars, to be paid to him whether he qualifies or does not qualify as executor of this will in the probate court. This legacy is in addition to the compensation he is entitled to for his services as executor.

Restraint of Marriage.—A legacy or devise given

on condition that the legatee does not marry is void; but if the gift is to A so long as she does not marry but, if she does marry, then to B, it is good.

I give and devise my farm, situated, etc., in the town of, etc., to my wife A, so long as she remains my widow. In the event of her marriage I give and devise said farm to B.

A common way is to create a trust and make provision like the following:

"If my daughter A shall marry without the written consent of B, her trustee or his successor in trust, then the trust shall terminate and the entire estate, discharged of all trust, shall go to C."

Restraint of Alienation.—A condition that the devisee shall not alienate is void. Land cannot be thus encumbered.

Conditions Not to Dispute Wills.—It is very common now to write in a will a condition not to dispute it. Of course this is a domestic consideration, as only those who would profit by inheritance, if there is no will, can dispute it.

Forms.—If any legatee under this will contests the probate thereof or, after it has been probated, interferes by any court proceeding with the settlement of my estate, then I declare void the legacy to such legatee, and the same shall fall into the residuum of my estate.

I declare that if either of my two sons shall dispute the probate of this will in any court or by any proceeding or call in question before any tribunal the validity of any legacies given and provisions made herein, then I revoke and declare void the

legacy or legacies given to said son, and the same shall fall into the residuum of my estate.

I further declare that, if any attempt is made to contest this will before any tribunal and proves unsuccessful, my executors shall pay all the expenses incurred thereby, including reasonable compensation to themselves in addition to that to which they are otherwise entitled as executors.

Gifts to Servants, Employees, Etc.—A legacy is often given on condition that the legatee is in the testator's employ at the time of his decease, or directly without any condition. The following are common forms:

I give and bequeath to each house and out-door servant, who may be in my employ at the time of my decease, the sum of five hundred dollars.

I give A as a recognition of faithful devotion to my interests a legacy of one thousand dollars.

I give and bequeath to each person in my employ at the time of my decease a sum equal to his or her salary for the year preceding that event.

I give my bookkeeper A a legacy of five thousand dollars. If he die before me, I give the same to his wife B.

If A is in my employ at the time of my decease, I give him the sum of five thousand dollars. If he die before me while in my employ and leave issue living at the time of my decease, then I give the said five thousand dollars to such issue to be equally divided among them.

DESCRIPTION OF LEGATEES AND LEGACIES

Legatees.—The attorney should take care that the

name of the legatee is absolutely correct in all cases, whether individual, association, society or corporation.

The description of legatees not by name but as "children," "heirs," etc., is often a source of embarrassment. For example, A gives a legacy to B, "provided I leave no heirs," meaning children or issue. At his death he leaves no children but has plenty of heirs. Hence B takes nothing. The decisions upon cases involving the ambiguous use of these words will fill volumes.

If a gift is to youngest or oldest sons with nothing more the question may arise whether is meant the youngest or oldest son living at the time of the making the will, or at the testator's death, or at some future time.

Other words which have been used unskillfully are "issue," "cousins," "next of kin," "descendants," "family," "legal representatives," and "survivor." If the words "wife" or "husband" are used with nothing more they may apply to a second wife or husband, when the first wife or husband is intended.

Description of Legacies.—Wearing apparel, watches, jewelry, etc., should be given directly. Instead of imposing conditions a request may be attached as in the following form:

"I give to my wife A all my wearing apparel, watches, jewelry and other personal effects. I trust that she will reserve the articles she desires as keepsakes and distribute the rest among our children as she may deem best."

Household furniture should be explicitly described, and, if it is intended to include personal

property in the stable or on the grounds, they should be mentioned.

Form.—I give and bequeath to my wife, A, all the furniture in my house, No. 100 Grove Street, at the time of my death, including my library, pictures, statuary, paintings, bric-a-brac, plate, chairs, carpets, china, silver, crockery, cooking utensils, beds, bedding, bookcases, linen, consumable stores and all other portable articles, whether useful or ornamental; and all my horses, harnesses, carriages and their appurtenances, automobiles, farming stock, supplies, tools, implements, hay and grain and all other articles that may be in or about the stable or on the grounds at the time of my decease.

Sometimes a testator provides that friends may select from the furniture or from plate or jewelry articles they may desire as keepsakes. Such a provision may give rise not only to discontent but to quarrels. Any article intended for a friend should be given outright.

It is well for a testator not to keep in his house certificates of stock or other securities, for, unless particularly mentioned, they may pass under a bequest of "all the personal property in my house at the time of my decease."

The word "money" generally means real money and bank deposits. Such a bequest as "all my money" is not advisable, as the testator may spend or invest the money in his lifetime.

SPECIFIC LEGACIES—ABATEMENT

Specific Legacies.—The gift of a sum of money, as "I give A five hundred dollars," is general and is

payable out of the testator's general funds. A specific legacy specifies the particular thing as in the following form:

"I give A my fifty shares of the People's National Bank, of, etc., the certificate being numbered 1406, meaning and intending the same as a specific legacy."

The testator in his lifetime may dispose of the fifty shares of the People's National Bank. In that event A gets nothing. A testator may add to the form just given the following provision:

"If at the time of my decease I am not the owner of the said fifty shares of the People's National Bank, then I give the said A in lieu thereof the sum of five thousand dollars."

Suppose the testator has pledged the fifty shares for his own debt and the will is silent on the subject. Then A will call on the executor to pay the debt out of the general funds of the estate. The executor will have to do it, and A will receive the fifty shares unencumbered.

If the specific legacy is of coupon bonds the testator may desire to provide that all overdue negotiable coupons attached to the bonds shall go to the legatee.

A very important matter is what is called "abatement," and this arises where the assets, after paying the testator's debts, are not sufficient to pay all the legacies. The general rule is that, in the case of deficiency of assets, the general legacies (such as legacies of sums of money) abate before specific legacies and devises are resorted to.

If the testator has few debts and the residuary clause in his will passes considerable property, there is little probability that an abatement will be neces-

sary. If the testator suffers severe losses after making his will, it is well to rewrite it provided it contains no provision as to abatement.

The following are forms which provide for abatement:

If my estate is insufficient to pay all bequests given herein, then the bequest to my said wife shall be paid in full and the other legacies shall abate proportionately.

If my estate shall be insufficient to pay all the legacies in full, then those given to my brothers, sisters, friends and servants, shall abate ratably to the end that my wife and children shall enjoy the provisions made for them herein without any deductions or abatement.

A perfect form of will is that which gives the entire estate in shares. Hence there can be no abatement as the legatees all share an increase in value and all bear a shrinkage, if any. The advisability of bequeathing property in shares cannot be too strongly urged.

Form.—I direct that all the property of which I shall die seized and possessed and to which I may be entitled at the time of my decease and wherever the same may be situated shall be divided into six equal shares. I give two of said shares to my wife, A; one of said shares to my daughter B; one of said shares to my son, C; one of said shares to my son D; and one of said shares to my two grandchildren E and F to be equally divided between them.

LEGACY TO DEBTOR OR CREDITOR OF TESTATOR

Legacy to Debtor.—If a testator gives a legacy to

one who owes him money it should clearly appear whether the testator intends to cancel the debt in addition to the legacy.

Forms.—I give A the sum of ten thousand dollars and I declare that all debts now due me or that hereafter may be due me from said A, at the time of my decease are hereby cancelled.

I give A five thousand dollars and expressly declare that it is not my intention to cancel any claim or claims I may have against him at the time of my decease.

A testator often provides for cancelling debts where no legacy is given the debtor as follows:

I direct my executor to cancel all claims of one hundred dollars or less, including unpaid interest, which I may hold against any person or persons at the time of my decease.

I give and devise to my son A the house and land (description) which he now occupies as my tenant, and I release him from the payment of all rent, taxes, repairs, insurance and any other charges accruing at the time of my decease.

I direct that all loans to my daughter A existing at the time of my decease, including interest due thereon, shall be discharged and cancelled. I direct my executor to deliver to her all notes held for such loans and the stocks and bonds held to secure the same.

It is common for a testator to provide that debts due him from children, as evidenced by note, book account, etc., be regarded as advancements made them and to be deducted from the shares given them in the will.

A child may say that he doesn't owe the alleged debt or that it is outlawed and cannot be collected. These objections cannot avail. The intention of the testator is paramount, and the testator may provide as he chooses.

Forms.—I declare that all advances of money to my children as appear by charges on my books at the time of my decease shall be deducted from the shares bequeathed to such children in this will and that no interest shall be charged or collected upon such advances.

All advances or loans made by me to any legatee under this will unpaid at the time of my decease are hereby cancelled and discharged; and this cancellation and discharge applies to all interest due on said advances or loans.

All money due me at the time of my death from any of my children whether by promissory notes, book accounts or in any other way, shall not be enforced against said children but shall be regarded as gifts, and all evidences of such indebtedness signed by my children shall be cancelled and given up to them.

Legacy to a Creditor.—It is a general rule that, if a testator gives a legacy to a creditor and says nothing more, the legacy is regarded as a bounty and not as a payment of the debt. However, it is said that "a legacy, exactly corresponding in amount and time of payment to an existing debt of the testator to the legatee, and given by a will which contains no provision indicating a different intention, is to be presumed to be in satisfaction of the debt and not in addition thereto."

The testator should make his intention clear.

Form.—I give A the sum of one thousand dollars in full satisfaction of my note to him of five hundred dollars dated etc., payable etc., and all interest which may be due thereon when this legacy is paid. I direct my executor to pay said legacy to said A only upon the condition that said notes shall be cancelled by said A or his legal representatives and delivered to my said executor.

PAYMENT OF AND INTEREST UPON LEGACIES

Statutes generally declare the time when legacies shall be paid provided there is no provision as to payment in the will. A direction to pay a legacy "as soon as convenient" is too indefinite and should be avoided.

A testator often puts a provision in his will directing his executor not to pay legacies until the period (one year or more as the case may be) has elapsed from the probate of the will, within which creditors must begin actions against the estate.

The following forms are given as illustrations:

I direct my executors not to pay legacies until three years have elapsed from the proving of this will, and the legatees are then to receive the exact amount of their legacies without interest thereon.

I direct that all legacies given herein shall be paid as soon as my executors can legally do so with interest from the day of my death at the rate of five per cent per annum.

I direct that all legacies given in this will shall be paid in two years from the date of proving the same. The pecuniary legacies are to be paid with

interest at the rate of five per cent per annum; and the specific legacies of stock and bonds are to be paid with an amount equal to the dividends collected and coupons cashed by my executors.

A convenient way of paying pecuniary legacies is by distribution in kind, that is by paying in property and not in money.

Forms.—In paying pecuniary legacies given by this will I direct my executors to transfer and deliver to the legatees securities, in which my personal estate is invested, at their market value.

As my estate consists largely of bonds, I authorize my executors in their discretion to pay the pecuniary legacies given in this will in bonds or partly in bonds and partly in money, the legatees to take such bonds at their market value.

In most states there are now statutes as to the taxation of legacies and distributive shares or of collateral legacies and successions.

The testator should be asked whether or not he desires the legatee to bear the burden of the tax. Forms like the following are frequently found in wills:

I direct that all legacy and succession taxes shall be paid out of the legacies themselves.

The amount of all taxes on legacies and devises given by this will shall be paid from the general funds of my estate.

I direct that the inheritance tax imposed upon the legacy of ten thousand dollars to A shall be paid out of and deducted therefrom, but that the legacy of five thousand dollars to B shall be paid to him in full, and that the inheritance tax imposed thereon shall be paid out of the general funds of my estate.

LAPSED DEVISES AND LEGACIES—RESIDUARY CLAUSE—REVOCATION

Lapsed Devises and Legacies.—The general rule is that, if a legacy or devise is given to A. and he dies before the testator and no provision is made on the subject, the legacy or devise lapses, that is, falls into the residuary clause of the will. In most states there are statutory provisions designed to prevent the lapsing of legacies and devises, as for example, declaring that, if the legatee or devisee leaves issue surviving the testator, the issue shall take the parent's share as the parent would have done had he survived the testator. The best way, perhaps, is for the testator to signify his intention in the will.

Forms.—If any legatee named herein shall die before me leaving issue at the time of his death, the legacy of such deceased parent shall go to such issue in equal portions.

If any legatee under this will shall die before me, the legacy to him shall not lapse but shall be paid to his administrator or executor as the case may be.

Residuary Clause.—The residuary clause has been called a drag-net. It passes all that has not previously been disposed of in the will as well as all after-acquired property and all void and lapsed legacies and devises.

In determining who shall be residuary legatee one should bear in mind that the general funds are first taken to pay debts, legacies and charges of administration. Property often increases or decreases in value between the time of making the will and the testator's death, and a person should not be named as residuary legatee unless the testator desires that

he receive the benefit of such increase, or bear the loss of such decrease.

Form.—All the rest, residue and remainder of my property, real and personal, of which I shall die seized and possessed and to which I may be entitled at the time of my decease and wherever the same may be situated, I give, devise and bequeath to A of etc.

Revocation.—A testator may revoke his will whenever he desires, and it may also be revoked by operation of law.

The common way to revoke a will is to burn it or tear it up. If a will is executed in duplicate, both copies should be destroyed. If the will is destroyed, a codicil or codicils should be destroyed also. In some states there are statutes as to witnessing the act of cancellation.

Sometimes a testator has two wills, that is, he has made a second will without having destroyed the first. If he destroys the second, he should also destroy the first, because in some jurisdictions the cancellation of the second will may revive the first one. Otherwise, if he desires the first will to stand.

In no event should a testator interfere with his will after it has been executed by striking out or inserting clauses. These changes should be made in a codicil or a new will should be drawn.

A revocation is sometimes implied by subsequent changes in the circumstances of the testator, as marriage or the birth of a child. The law on this subject differs in different localities and there are statutes on the subject. The attorney should bring this matter to the attention of the testator, for in many cases it may be advisable to make a new will.

If, after making a will, a testator changes his domicile, it may be advisable to rewrite and re-execute the will.

EXECUTOR

Selection of Executor.—The question is whether to have a trust company or an individual as executor. If a testator's estate is well invested and he is not engaged in business a trust company is perhaps preferable; otherwise an individual. It is well for a testator to consult with the person or persons he desires to name as executor or executors to see if they are willing to accept.

Forms.—I nominate and appoint A & B or the survivor of them the executors of this will and release them from giving a surety or sureties upon their official bond.

I constitute and appoint my wife A and my son B the executors of this will and I exempt them from giving bonds or, if bonds are required, then I release them from giving a surety or sureties thereon.

I appoint A the executor of this will and release him from giving sureties on his bond; and, if this will is proved in other states, I direct, if I am permitted so to do, that he be released from giving sureties in such states.

I appoint the American Trust Company of etc. the executor of this will.

I nominate and appoint the Equity Trust Company of New York, and A of that city the executors of this will, and I release the said A from giving a surety or sureties upon his official bond.

I constitute A the executor of this will and direct that any surety company authorized by law shall be the surety upon his bond and that the expense thereof shall be paid by my estate.

The Executor's Bond.—In a few states an executor is not required to give bond unless circumstances require. Generally, however, the executor must give bond with sureties unless released by the will. A surety company is released from giving sureties. Forms are given above.

It has been customary in some states for a testator to authorize an executor not to file an inventory, but now, as inheritance tax laws are almost universal, an inventory is necessary in order to determine the amount of the property subject to tax.

Sometimes a testator exempts an executor from liability for the default of his co-executor as follows:

Each executor of this will shall be liable for his own fraudulent acts and not for those of his co-executors.

Each executor shall be answerable for his own fraudulent acts or misconduct and not for those of the other executors, and none of my executors shall be answerable for errors of judgment honestly exercised.

The Executor's Compensation.—As a general rule, executors are entitled to compensation for their services and for the charges of counsel.

There may be good reason for the testator's making provision in his will as in the following forms:—

I direct that my executors shall receive fair compensation according to the services they severally render my estate.

I direct that each of my executors shall receive the sum of three thousand dollars in full payment for his services.

I direct that my executors shall be allowed in full compensation for their services, to be equally divided among them, two and one-half per cent upon the appraised value of personalty and all realty sold by them, if the sale of realty is required in the settlement of my estate, and five per cent upon all income collected by them while the estate is in their hands.

If the executor is an attorney the testator may provide as follows:

I direct that my executor be allowed for professional services a reasonable amount in addition to his charges as executor.

I direct that my executor shall be compensated only as such and shall receive no remuneration for services rendered the estate as attorney.

When a will is contested a testator may authorize the executor to pay from the estate the expenses incurred by him as follows:

If the probate of this will is contested in any tribunal and proves unsuccessful, then I direct that all legal and other expenses incurred by my executors therein shall be paid out of the general funds of my estate; but none of the expenses of those contesting the will shall be so paid.

Debts and Funeral Expenses.—There is no need to provide in the will as to debts and funeral expenses as the executor must pay them. Debts are to be paid out of personal estate and the realty is to be resorted to only when the personal estate is insufficient to pay them.

A testator may direct how his assets shall be handled in order to pay debts and may state the amount of his obligations for the guidance of his executor as in the following form:—

I state for the information of my executor that I am not liable on any commercial paper, either as maker or indorser, and that it is my intention to have no debts at the time of my decease except those of a domestic nature.

Powers to Sell, Mortgage, Lease, Etc.—In many states the devisees are entitled to the rents and profits of real estate until sold for the payment of debts; so, if the executor uses any part of the real estate, assuming that he does not have to sell it for the payment of debts, he must account for the income.

Power to mortgage should be distinctly given as a power to sell and convey does not confer a power to mortgage. A clause is generally inserted in the power of sale that the purchaser shall not be required to see to the application of the purchase money. A similar purpose is subserved by providing that executors' receipts shall exonerate those taking them from all liability.

Forms.—I give my executors and the survivor of them full power and authority, if for the payment of debts and legacies they find it necessary, to sell by public auction or by private sale and to mortgage both real and personal estate, and execute, acknowledge and deliver all deeds, mortgages or other instruments required; and in no case shall the purchaser or purchasers or the mortgagee or mortgagees be required to see to the application of the purchase

money or rent.

The receipts of my executors for all moneys paid and for all property transferred to them shall absolutely discharge the person or persons so paying or transferring, and such person or persons shall not be required to see to the application of said moneys.

Authority to lease may be given as follows:—

I authorize my executors to lease any or all my real estate for terms not exceeding four years from the proving of this will with such covenants as may be proper.

Directions to Insure.—Such directions as the following may be conferred:

I direct that all buildings upon my real estate be insured for amounts equal to their real valuation, and I authorize my executors to pay the premiums out of the general funds of my estate.

Upon the expiration of any policies of insurance upon the buildings upon my real estate I direct my executor to renew the same for such amounts as he may deem proper.

Compromise and Arbitration.—While in many jurisdictions authority is conferred by statute to settle by compromise or arbitration demands in favor of or against estates, testators often confer the power in their wills.

Forms.—I empower my executors to compromise any and all claims in favor of or against my estate as I could do if living, and their adjustments, compromises and settlements are to be absolutely binding and are not to be called in question by any one.

I authorize my executors to compromise any debt

or debts due my estate by the receipt of cash, by allowing time or by accepting security, real or personal, therefore, and debts or demands against my estate by paying cash in settlement thereof.

I authorize my executors to adjust all claims in favor of or against my estate either by compromise or arbitration.

Employment of Attorneys, Clerks, Agents, Etc.—Requests like the following often appear in wills:

I request my executor to employ A as his attorney in the settlement of my estate.

I request my executors to retain in their service my faithful bookkeeper A.

I authorize my executors to hire an office and employ such bookkeepers, clerks and attorneys as they may deem proper and pay all the expenses thereof out of the funds of my estate.

Suggestions as to Keeping Records.—A recommendation like the following may be advisable:—

To facilitate the settlement of my estate and to avoid misunderstandings, I recommend that my executors keep a record of every meeting. I suggest that one of them be selected as clerk and that, at the close of each meeting, he enter in a book a brief statement of the business proposed or transacted.

Auditing Accounts and Examining Securities.—As the duties of executors generally cover a limited period the insertion of a direction to the executors to permit the legatees under proper regulations to examine accounts and securities is not so urgent as in the case of trustees.

TRUST AND TRUSTEE

A trust is not always advisable, yet there may be

good reasons for creating one as in the case of:

A dissipated or incompetent son.

A daughter who has an unreliable husband.

A spendthrift.

A minor child.

A helpless friend or relative.

A person in another jurisdiction, as a married woman, the laws of whose domicile restrict her in the enjoyment of property.

The trust should be clearly defined. Sometimes a testator creates a trust of all that he shall leave over a certain amount. This is too uncertain and indefinite. While it is said that every kind of property capable of assignment may be the subject matter of a trust, yet such articles as household furniture and personal effects should be given outright.

The Trustee.—Nearly any one can be a trustee. The selection, however, is one of sound judgment and good sense.

Trust companies are authorized by statute to be trustees. An objection is that those interested do not feel freedom in consulting with corporations as they do with individuals. On the other hand, if a trustee resigns, is removed or dies, a new trustee must be appointed. This procedure is avoided in the case of a trust company.

The Trustee's Bond.—If a Trust Company is appointed no sureties are required as in the case of an individual. As to releasing trustees from giving sureties, the same rules apply as in the case of executors.

Compensation of Trustees.—The preceding remarks on executor's compensation may be referred

to. The trustee is allowed, in a number of states, five per cent upon the gross amount of income collected by him, and from one to two and a half per cent upon the gross amount of principal conveyed to the remaindermen when the trust ends.

When a lawyer acts as trustee, he is generally entitled to compensation for professional services in addition to that to which he is entitled as trustee. The testator may desire to provide as follows:—

I direct that my trustee shall be allowed for professional services such an amount as is just and reasonable.

While my trustee shall receive adequate compensation as such, I direct that he shall not be compensated for services he may render the estate as attorney.

Power to Sell, Mortgage, Lease, Invest and Reinvest.—A will should contain a full power to sell, invest and reinvest.

The following is a comprehensive authority:

I authorize and empower my said trustees and their successors in trust to sell, mortgage, lease and convey upon such terms as they may deem best any or all of the real and personal estate constituting the trust and reinvest the proceeds in property, real or personal, suitable and proper for trustees to invest in; and I authorize and empower them and their successors to execute, acknowledge and deliver any and all legal instruments in writing required to execute the above powers; and no purchaser shall be required to see to the application of the purchase money. The receipts of my said trustees and their successors for any moneys paid to them shall be an absolute discharge to the person or persons paying

the same, and such persons or persons shall not be required to see to the application thereof.

If there are no directions in the will as to investments, trustees can invest only in property recognized as suitable. In some states trustees are held to specified investments, and in others they are held only to good faith and the exercise of sound discretion.

The rule that a trustee is protected, if he takes the same care of the trust property he takes of his own or takes the same care a prudent man takes of his own, is unsound.

Testators often give instructions as to investments, such as certain bonds, real estate, mortgages, etc., and as to retaining certain of their own investments.

Auditing Accounts and Examining Securities.—It is doubtful if there is in any state a statute authorizing such auditing and examination. If every will should contain a provision on this subject, and the parties in interest should investigate annually, there would be few defalcations.

Form.—When my trustees have prepared their annual account, I direct them to give the same or a copy thereof to A, the beneficiary, and to B, the remainderman and thereupon to submit to the said A and B or to their attorney or attorneys the securities and other property of the estate and allow them ample time to examine the same. I authorize the said A and B to make such examination and take such notes as they may desire either personally or by attorney, and I direct my said trustees to give them reasonable assistance.

As to insurance, compromise and arbitration, sug-

gestions as to keeping records, employing attorneys, agents, etc., see preceding pages.

The Beneficiary.—Nearly any one can have property held in trust for him.

One of the first matters to consider is the payment of income. The phrase "net income" means the income remaining after payments for repairs, taxes, trustees' compensation, insurance and other incidental expenses have been deducted from "gross income."

Forms.—The income of the trust herein created shall be payable from the date of my death.

I declare that the income of all trusts herein created shall be payable from the date of the proving of this will in the probate court.

I declare that the income of the trust herein created shall not be payable until two years from the day of my decease.

If it is not convenient to establish the trust until a considerable period has elapsed from the time of the testator's decease, a special provision like the following may be inserted:

I direct my executors to pay A in quarterly payments from the time of my decease until the trust for his benefit has been established a sum of money equal to five per cent per annum upon the amount so given in trust.

The period of payment of income should be stated as "monthly," "quarterly," "semi-annually," or "annually," or a modifying clause may be added, as "I direct my trustee to pay the income to B in quarterly payments or as often as he may deem best."

In some jurisdictions a testator may provide that

the income shall not be anticipated or alienated by the beneficiary or taken by his creditors.

Forms.—I direct that said income shall not be alienable by the said A either by assignment or by any other method, and that the same shall not be subject to be taken by his creditors by any legal process whatever or pass in any event to his assignee or trustee under any insolvent or bankrupt law, state or national.

A testator may provide that the trustee in his discretion may add a part or all of the income to the principal of the trust.

Form.—I authorize my trustee to add to the principal of the trust such part of the net income as they may deem best, but I desire them not so to capitalize any part of the income if the habits of the beneficiary are in their judgment satisfactory.

Many wills contain provisions as to annuities, as "I give A an annuity of five hundred dollars." Suppose the trustee establishes a fund of ten thousand dollars to yield this annuity and that in a few years the investments so depreciate as to yield only two hundred dollars. A perplexing question is presented. A better way is to establish a trust of ten thousand dollars and give the beneficiary the net income thereof.

Trusts frequently provide for the application of income for education and support of the beneficiary. It should appear whether the trustee is to pay over the income or personally expend it. If the beneficiary is an infant or is incompetent, it may be advisable to direct the trustee to pay the income to a guardian for the support of the beneficiary. If the

whole of the income is not to be applied the trustee should be directed to add all income unexpended to the principal. If the estate is a small one the trustee may be directed, if the income is insufficient for the beneficiary's support, to resort to the principal.

Questions arise as to what is income and what is principal. Courts are frequently requested to determine these questions, and legal expenses are incurred which might be avoided if wills contained clear instructions on the subject. The most perplexing questions occur in the case of stock or large cash dividends. In recent years many wills provide that the trustee is to determine in the case of such dividends what is principal and what is income and that his judgment is to be final.

When the trustee is authorized to change investments, it may be well to provide that commissions be paid from principal.

Form.—I direct that commissions on all sales of either real or personal property be paid from principal and not from income.

Termination of the Trust.—There is in many localities a law called the rule against perpetuities, which provides that a trust must terminate within a certain period. The attorney will call attention to this rule and see that it is not violated.

Clear and exact language should be used in providing for the termination of a trust and those who are to take the property, discharged of trust, should be definitely described. Giving the estate to the "heirs" or "next-of-kin" of a certain person is a method not to be encouraged, but, if employed, the will should state whether "heirs" or "next-of-kin"

at the time of the making of the will, at the date of the testator's death or at the time of the termination of the trust, are intended.

A testator may provide that the estate shall go to A, but, if at the time of termination of the trust he be not living, then to any person or persons he may name and appoint in his will.

Provision as to termination by installments is common, especially when the same person is both beneficiary and remainderman. For example, a man creates a trust for a son, giving him the income and then providing that the trust shall terminate by the trustee paying to him one-half of the principal in ten years and the other half in twenty years.

Trustees are sometimes authorized to terminate the trust in the exercise of a reasonable discretion.

GUARDIAN

Testamentary guardianship of minor children, especially those of the testator, is almost universal.

Statutes frequently declare that the father, if living, and, in case of his death, the mother, shall be entitled to the custody of the person of the minor and to the care of his education, while the guardian shall have the care and management of the ward's estate; so also that the right to appoint a guardian by will shall be in the father, or, if he has died without exercising the power, then in the mother.

As the ward is both beneficiary and remainderman, the keeping of the guardian's accounts is a simple matter. Interest is added to the principal, the expenses are deducted and the balance forms the new capital.

It is well to give the guardian all the power of a trustee to sell, invest and reinvest, and, indeed, a great deal of the law in the preceding pages relative to trustees applies to guardians.

A guardian may be named as follows:

I appoint A the guardian of my daughter B and release him from giving a surety or sureties upon his bond. I desire him to have a parental care of my said daughter during her minority.

I constitute and appoint my wife A the guardian of my children B and C without sureties upon her official bonds.

I appoint no guardian of my children A and B as my trustee as already provided herein is to apply the income of the trust for their support and education. I commend my children to the care and affection of their Aunt C, relying on her kindly oversight.

All money given herein for the benefit of any minor may in the trustee's discretion, be paid by him to the guardian or parent of such minor, and the trustee is not required to see to the application thereof.

PUBLIC CHARITIES

The subject of charitable gifts is not always a satisfactory one as the statutes in the different states differ materially, and as changes in circumstances and conditions make recourse to the courts frequent. A trust must terminate within a certain period, but a public charity in most jurisdictions is perpetual. For this reason unforeseen events often prevent the carrying out of the testator's wishes and make the assistance of the proper tribunal imperative.

A law writer has declared: "It may be said generally that valid charities are created where the gifts

are for the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for education, for relief of the poor and sick, for the promotion of agricultural or horticultural improvements, for public parks, for the benefit of disabled soldiers and seamen, for the missionary cause of a church, for the public good by encouraging learning, science, and the useful arts, for poor meritorious widows living within certain limits, for the cause of Christ, for the support of a city missionary of a certain church, for public libraries, etc.

"It may be said generally that invalid charities are created where the gifts are for public worship, which is public only in the sense that it is open to the public by courtesy, to executors to be distributed to such persons, societies, or institutions as they may consider most deserving (the word "charitable" being omitted), for the permanent care of a private tomb or burial-place, to a school, which is a private pecuniary enterprise, etc."

An excellent method is to give the legacy outright, that is to say, to bequeath the money directly to some institution with a request that it be used as an entity or the income be used for certain designated purposes. In such case the testator should state that the bequest is an absolute one and that he merely trusts that his wishes will be respected.

EXECUTION AND ATTESTATION—CUSTODY OF THE WILL

Execution and Attestation.—It is not intended to give at length the rules upon this subject as the at-

torney will see that the will is executed conformably to the law of the jurisdiction. Certain matters, however, may be noted. Obliterations and interlineations are to be avoided. But, if made before the execution of the will, the attorney will see that they are referred to between the attestation clause and the signatures of the witnesses, each witness before signing having verified the changes by actual observation.

In many states wills executed on Sunday are valid. Unless illness or some other circumstance makes the execution on that day urgent, a week-day is preferable.

The wording of the *in testimonium* clause may be as follows:

In testimony whereof I have hereunto set my hand and seal this tenth day of May, A. D. 1920.

In testimony whereof I have hereunto set my hand this ninth day of January, 1920, and have written my name on the margin of each preceding page.

In testimony whereof, I have to this my last will contained on ten sheets of paper and to every sheet thereof subscribed my name this fourth day of April, A. D. 1919.

The witnesses should be persons of character and standing, such as business men, physicians, and friends and acquaintances of the testator. Minors, persons incompetent or convicted of crime, an heir-at-law of the testator, an executor named in the will, a legatee or devisee under the will, the husband or wife of a legatee or devisee, a creditor of the testator and a member or stockholder of a corporation to which property is given in the will, should not be witnesses.

If it is apprehended that the will may be contested, the testator's physician should be a witness.

Wills are often executed in duplicate. One copy only will be probated. The following is a form of *in testimonium* clause:—

In testimony whereof, I have hereunto and to another will of identical contents set my hand, etc.

The following is a common attestation clause:

Signed, sealed, published and declared by the testator as and for his last will and testament, in the presence of us, who, at his request, in his presence and in the presence of one another, have hereunto subscribed our names as witnesses.

The following forms are taken from actual wills:

"We, the undersigned, certify that on this tenth day of April in the year of our Lord nineteen hundred, A. B. exhibited to us the foregoing instrument in typewriting on three pages, inclusive of this, and declared the same to be his last will and testament, and requested us to witness his execution of it. Whereupon he did, in our presence, subscribe his name at the end thereof, and the signature A. B. at the end thereof is the genuine signature of said testator. He did also in our presence write the initials A. B. in the margin of the first and second pages of said instrument. We do, therefore, in the presence of said testator and of each other, subscribe our names as witnesses."

"The foregoing instrument contained on this and the fifty-one preceding pages, was on this twenty-fifth day of February, in the year of our Lord nineteen hundred and four, signed, sealed, published and declared by the said A. B., the testator therein named,

as and for his last will and testament, in the presence of us, who at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses, having also seen the said testator's name written by him in full on the margin of each page except the last one."

"On this 14th day of July, A. D. 1898, the undersigned being present and believing the testator to be of sound mind and memory, saw the testator subscribe the foregoing will. At the time of such subscription the testator stated to all the undersigned that the paper was his last will and testament. Thereupon each of us, in the presence of the testator, and at his request, and in the presence of each other, hereby attest and subscribe said will as witnesses, the day and year above written."

Custody of the Will.—The document should be placed where no opportunity will be afforded to purloin or tamper with it. It may be placed in the custody of the testator's attorney or of the executor named in it. If the testator retains the will himself, he should notify the executor of the place where it may be found after the testator's decease. Trouble has been occasioned where a testator has placed the will in his safe deposit box and left no instructions with the company as to permitting his executor to open the box after his decease and remove the will. Now most safe deposit companies have a rule like the following:

"No one but the Renter, or his Nominee, or legal Representative duly qualified to the satisfaction of the Trust Company shall have access to the Safe. Provided, however, that if, after the decease of a

box-renter it is claimed that the box should be opened to ascertain whether it contains a will, believed to be in the box, either by use of the box-renter's key or by use of the necessary force in case such key appears to be lost—and the Trust Company has not received actual notice that the claim is opposed by the family of the deceased—the Vaults may give access to the box for the purpose stated but no other. If a will be found, the person therein named as executor, being then and there present, shall be permitted to remove the will if some person not then and there present is named as executor in the will, the box may be reopened in the same way to enable such person to remove the will; and in any event for any such opening of the box or removal of a will therefrom there shall be no duty or responsibility on the part of the Vaults respecting the said will or otherwise."

In most states if a will is lost or destroyed, a correct copy thereof duly sworn to may be admitted to probate. It is, therefore, advisable that the attorney who draws the will should keep a copy of it. In some places statutes provide that the testator may enclose the will in a sealed envelope and deposit it in the probate registry, to be delivered after his decease to the executor or executors.

There are statutory provisions that a will must be presented for probate within a certain period after the decease of the testator, and also imposing penalties for the larceny or destruction of a will.

Geo. F. Tucker